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RESTRICTIVE TRADE PRACTICES COMMISSION

REPORT

Concerning the Sale of Plumbing and Heating Supplies and Related Products in the City of Montreal and Elsewhere in the Province of Quebec

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DEPARTMENT OF JUSTICE OTTAWA

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ROGER DUHAMEL, F.R.S.C.

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RESTRICTIVE TRADE PRACTICES COMMISSION

REPORT

CONCERNING THE SALE OF PLUMBING AND HEATING
SUPPLIES AND RELATED PRODUCTS IN THE
CITY OF MONTREAL AND ELSEWHERE
IN THE PROVINCE OF QUEBEC

COMBINES INVESTIGATION ACT

Ottawa

1963

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Queen's Printer and Controller of Stationery

Ottawa, Canada

1964

RESTRICTIVE TRADE PRACTICES COMMISSION

Robert S. MacLellan

Chairman

Pierre Carignan, Q.C. Member

W.D.R. Eldon

Member

RESTRICTIVE TRADE PRACTICES COMMISSION

OTTAWA

February 7, 1964.

Honourable Guy Favreau, P.C., Q.C., M.P., Minister of Justice, Ottawa.

Dear Mr. Favreau:

I have the honour to transmit to you the French and English texts of a report by the Restrictive Trade Practices Commission.

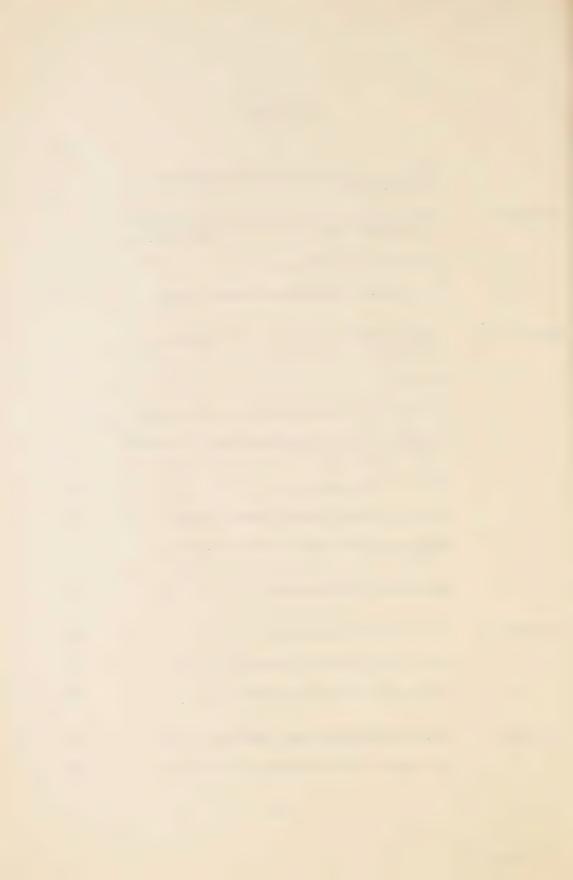
This report follows from an inquiry carried out under the Combines Investigation Act and relates to the sale of plumbing and heating supplies and related products in the City of Montreal and elsewhere in the Province of Quebec.

Yours faithfully,

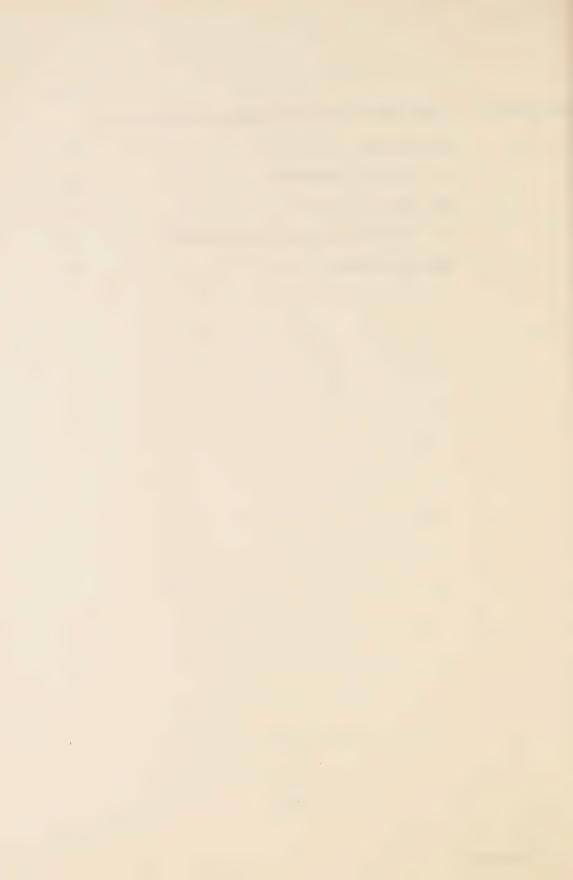
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INTRODUCTION:

ORIGIN AND NATURE OF THE INQUIRY

The Director of Investigation and Research under the Combines Investigation Act conducted an inquiry into the sale of plumbing and heating supplies in Montreal and vicinity. The formal inquiry began on September 15, 1960 when the Director applied to the Commission under section 10 of the Act for authority to enter premises and examine books, papers, records and other documents. In April and May 1961, witnesses, most of whom were officials of manufacturers or wholesalers of plumbing or heating supplies, were examined before either the Chairman or a member of the Commission. On the basis of the oral and documentary evidence, the Director subsequently prepared a statement of the evidence containing allegations that certain parties had committed, an offence under the Combines Investigation Act. 2

The allegations of the Director, quoted from his Statement of Evidence, dated January 3, 1963, were:

"125. It is my allegation that

Canadian Plumbing & Heating Specialties Limited

Craig Plumbing & Heating Supplies Co. Ltd.

Crane Limited

Deschenes & Fils Limitee

Omer De Serres Limitee

Marcel Drouin Ltd.

Emco Limited

Ideal Plumbing Supplies Ltd.

International Plumbing and Heating Supplies
Limited

Jamieson-Dansereau Limited

La Riviere Inc.

Main Plumbing & Heating Supplies Co.

Mott Company Limited

L.N. & J.E. Noiseux Limitee

A. Prud'homme & Fils Limitee

The James Robertson Company, (Limited)

conspired, combined, agreed or arranged to prevent, or lessen, unduly, competition in the distribution and sale of plumbing and heating supplies in the City of Montreal and elsewhere in the Province of Quebec.

- 126. It is my further allegation that Charles E. Chartrand was a party to the said conspiracy in that, as a paid employee of the conspirators, he performed much of the detailed work in connection with the operation of the conspiracy.
- 127. Western Plumbing Supplies, formerly located at 5155 Arnoldi Street, Montreal, was a party to the conspiracy for some time but this firm had ceased to do business at the date this inquiry was started.
- 128. It is my further allegation that

Crane Limited

Emco Limited

The Garth Company

Grinnell Company of Canada Limited

The James Robertson Company, (Limited)

La Riviere Inc.

conspired, combined, agreed or arranged to prevent, or lessen, unduly, competition in the distribution and sale of plumbing and heating supplies to so-called industrial accounts in the City of Montreal and elsewhere in the Province of Quebec.

129. It is my further allegation that Leslie A. Osmond was a party to the conspiracy referred to in paragraph 128 in that, as a paid employee of the conspirators, he performed

much of the detailed work in connection with the operation of the conspiracy."

After the Statement of Evidence was received by the Commission and by the parties against whom allegations were made, the Commission called a hearing as provided for in the Act. The purpose of the hearing, held in Montreal on June 11 and 12, 1963, was to permit the Director or his representative to submit argument in support of his statement of the evidence, and to provide the parties against whom allegations were made a full opportunity to be heard.³

The appearances registered at the commencement of the hearing were as follows:

F.N. MacLeod Gaston Meloche)	representing the Director of Investigation and Research
Hazen Hansard, Q.C.)	representing Emco Limited and The Garth Company
E.K. McDougall, Q.C.)	representing Charles E. Chartrand
Manuel Shacter)))))	representing Canadian Plumbing & Heating Specialties Limited; Craig Plumbing & Heating Supplies Co. Ltd.; Ideal Plumbing Supplies Ltd.; Main Plumbing & Heating Supplies Co.; La Riviere Inc.
Leon Bissonnet, Q.C.)	representing Omer De Serres Ltée.
R.H.E. Walker)	representing Grinnell Company of Canada Limited
J. Alex Prud'homme, Q.C.)	representing A. Prud'homme & Fils Limitee
Lazarus Tinkoff, Q.C.)	representing International Plumbing and Heating Supplies Limited
E. Jacques Courtois)))	representing Jamieson-Dansereau Limited; Deschênes & Fils Ltée.; Mott Company Limited; L.N. & J.E. Noiseux Limitee

R.E. Parsons) representing Crane Canada) Limited; The James Robertson) Company (Limited)

Leslie A. Osmond) representing Leslie A. Osmond.

representing Marcel Drouin Ltee.

At this hearing, certain additional evidence was introduced through witnesses. The witnesses called were:

M. Drouin

Lucien Cowan

manager, marketing research,
Crane Canada Limited

W.E. McCoy

executive vice-president,
Crane Canada Limited

John W. Adams

vice-president, finance, Emco
Limited

Denis St. Jean

assistant secretary-treasurer,
The Garth Company

Jacques Gagnon

secretary-treasurer, La Riviere
Inc.

The Commission also considered representations made by parties against whom allegations had been made or by their counsel in memoranda submitted prior to the hearing. Leslie A. Osmond, one of the parties accused, while present at the hearing, made no oral submission but rested his defence on his statements in his letter to the Commission dated May 16, 1963.

Following the hearing, the Commission has prepared this report, pursuant to section 19 of the Combines Investigation Act, which amongst other things instructs the Commission to review the evidence and material, to appraise the effect on the public interest of arrangements and practices disclosed in the evidence, and to recommend the application of remedies.

CHAPTER I

THE ALLEGATIONS AGAINST TWO GROUPS OF PLUMBING AND HEATING WHOLE-SALERS

1. Allegations of the Director

The allegations of the Director of Investigation and Research which form the subject of this Report concern two distinct associations of companies and the two individuals who acted as secretary of the respective associations. One association of plumbing and heating wholesalers was named The Quebec Plumbing and Heating Council. The evidence does not reveal that the second association had any formal name, but it will be convenient to call it the "Industrial Group" since this association consisted of firms selling to large customers known as "industrial accounts".

As quoted in the "Introduction" to this Report, the Director after conducting an investigation alleged in his Statement of Evidence 4 that sixteen manufacturers and wholesalers in the Montreal area had violated the Combines Investigation Act by an illegal agreement to prevent or lessen unduly competition in the distribution and sale of plumbing and heating supplies in the City of Montreal and elsewhere in the Province of Quebec. These firms were members of The Quebec Plumbing and Heating Council. His allegation against the second association, the Industrial Group, was to the effect that six firms agreed illegally to prevent or lessen unduly competition in the distribution and sale of plumbing and heating supplies to "industrial accounts" in the same area. Four of the firms in the Industrial Group were also members of the Council, but two were not and so are not included in the first allegation. These two firms are The Garth Company and Grinnell Company of Canada Limited.

In addition, the Director alleged that Charles E. Chartrand was a party to the first conspiracy in that, as a paid employee of the conspirators, he performed much of the detailed work connected with the operation of the conspiracy. A similar allegation is made against Leslie A. Osmond, the secretary of the Industrial Group.

2. The Wholesale Plumbing and Heating Trade

The many varied materials and supplies used by plumbing and heating contractors are traditionally sold by the manufacturer or national distributor to wholesalers for resale to the

contractor. The contractor either makes the installation or repairs it, and in either case it is not usual for the customer to purchase the necessary supplies through any other channel than the contractor. An exception is the purchase by large industrial firms or municipalities, (known in the trade as "industrial accounts") of their extensive requirements directly from manufacturers or large distributors. The ordinary wholesaler is by-passed, but he is not in any event equipped to carry the wide range of stock or to satisfy the sudden, pressing service needs of these industrial accounts.

Certain of the smaller wholesalers are known as "semi-jobbers". In the trade the semi-jobber is not generally recognized as a jobber or wholesaler. Many manufacturers will not sell to them. Others sell to semi-jobbers but at higher prices than they charge to customers whom they recognize as bona fide wholesalers. In general, the semi-jobbers manage to locate manufacturers who will sell to them at prices enabling them to remain in business, and they may also rely on imported lines. Reliance upon imports is not always satisfactory, especially where customer specifications call for products made in Canada. For some supplies the semi-jobber may be forced on occasion to buy from an established wholesaler. The semi-jobber, therefore, is both a competitor and on occasion a customer of the larger wholesaler.

In the Montreal area, certain firms, notably Crane and Emco, operate both manufacturing and wholesale divisions. Through its wholesale division Crane, for example, sells to plumbing and heating contractors and semi-jobbers who are not permitted to buy directly from the manufacturing division. Yet other larger accounts may be allowed to buy the same products more advantageously from the manufacturing division.

Prices paid for a product by a wholesaler or a semi-jobber are related to the discount extended to him by the seller. A wholesaler may qualify for maximum discount from a manufacturer because of the volume of his purchase, his paying record, his service to his own customers, or his storage facilities. A semi-jobber who could not extend all of these services would not qualify for as large a discount. The larger wholesaler who can buy in large volume and give better service to his customers accordingly enjoys a competitive advantage over the smaller wholesalers and semi-jobbers.

CHAPTER II

THE QUEBEC PLUMBING AND HEATING COUNCIL

1. Formation

The Quebec Plumbing and Heating Council was formed in 1958, and its by-laws were adopted at a general meeting on August 28, 1958. Article IV of the by-laws dealing with "Membership" provided that:

"Any person, firm or corporation engaged in the business of distributing at wholesale to plumbing and heating contractors, and any person, firm or corporation engaged in the manufacture of lines of goods essential to the plumbing and heating industry, who possesses the proper qualifications as approved by the Membership Committee, may become a member upon the recommendation of two (2) members in good standing, and upon the unanimous approval of the wholesaler members of the Council, and upon the payment of the prescribed current membership fees."

Article V provided that the right to vote would be restricted to wholesaler members, and that only wholesaler members should have any vested interest in the property of the Council. 7

Several witnesses in speaking of the reasons for formation of the Council spoke of low profits in the wholesale plumbing and heating trade in the Montreal area. For instance, G.H. Tessier, manager of the Montreal branch of The James Robertson Company referred to the "very chaotic condition" in the industry, which he attributed in large measure to "imported products and low-grade imported products". The Council was formed, he said, to see what could be done to improve the situation. B.S. Munro of Jamieson-Dansereau expressed the belief that the Council was formed to stop a general decrease in gross profits of the wholesalers, a phenomenon which was widespread, affecting both Canada and the United States. 9

The interest of various members in the Council and possibly their reasons for joining it may have varied. Mr. Wright of Canadian Plumbing & Heating Specialties Limited testified that he was especially interested in finding out as much as possible about credit problems relating to different accounts. ¹⁰ Mr. Markey of Crane of Canada Limited stated that his firm continued to participate in the Council in the hope of curing some of the "ills of the industry", especially those caused by imports. ¹¹

In any event, according to the evidence of Mr. Chartrand, secretary of The Quebec Plumbing and Heating Council, all of the recognized Montreal wholesalers were members of the Council. In the light of all the evidence, the term "recognized" wholesaler would appear to mean one recognized by the manufacturers of plumbing supplies. Those who were members paid dues on the basis of \$100 or \$200 or \$300 per quarter depending upon the size of the business done by the firm. ¹² The Council ordinarily met weekly, usually at the Capri Motor Hotel. The present inquiry was formally begun in September 1960, and early in 1961 the Council was disbanded. After this, the members met informally and irregularly. ¹³

The allegations of the Director of Investigation and Research in his Statement of Evidence call into question the legality of the Council's activities. In brief, the Director charges that the members of the Council conspired or agreed illegally to limit competition in the sale and distribution of plumbing and heating supplies. Whatever purposes the Council may have served by informing members about credit problems or conditions in the plumbing industry in Montreal, the Director charges that certain of its activities were illegal inasmuch as the members agreed upon the discounts which would be charged to their customers, a form of price-fixing whose nature was illegal. The Director's allegations were denied by the parties who appeared at the hearing by the Commission to receive their defence.

In reviewing the evidence as required by the Combines Investigation Act, the Commission will deal first with the question of whether an agreement or common design relating to prices existed. If it is established that there was an agreement, the report will next consider how it worked and whether it was enforced. Subsequently, the effects on competition will be considered - the degree of control over the market held by the parties to any agreement, and how this control was or could have been utilized to lessen competition if the agreement were carried out. Then it will be necessary to consider the effects of the Council's operations on the members themselves, and whether they drew any advantage from their membership. These will be the chief questions to be answered in the remainder of this chapter.

2. Was there an Agreement Relating to Discounts?

It has already been pointed out that different discounts might be extended to different customers by manufacturers or wholesalers in the plumbing and heating trade, even in the absence of any agreement regarding discounts, for such reasons as differences in

volume of purchases, in credit rating, or in capacity to provide service when selling the goods. The evidence shows, however, that the members of the Council in their meetings discussed prices and discounts and decided upon the discounts which all of them would uniformly grant to certain customers and classes of customer. These decisions were published to all members of the Council by means of bulletins issued by the secretary.

Several witnesses testified to the effect that prices and the discounts to be allowed various customers formed an important part of the discussions at Council meetings. 14 The secretary of the Council, Mr. Chartrand, explained the use made of discounts in bulletins which he sent out. Discounts were applied to a retail or list price as published in a recognized catalogue. Obviously any wholesaler using the same list price for an article described in the catalogue and the same discount cited in a Council bulletin would arrive at the same actual price to his customer. The catalogues referred to were Allpriser, Crane, Emco, Omer De Serres, Dominion Standard, Henderson, and H.A. Rogers. 15 The catalogues were either those of particular manufacturers or composite lists of articles produced by various manufacturers. According to the evidence, the Allpriser was quite widely used.

The Council ordinarily was concerned not with the prices in the Allpriser but with the discounts. Nevertheless, manufacturers such as Crane (who was a member of the Council) initiated changes in list prices which subsequently appeared in the Allpriser, and a letter written by T.G. Markey, manager of Crane's Montreal branch on April 4, 1960, indicates that the list prices in the Allpriser may have been discussed by Council members in meetings. 16 In part, Mr. Markey wrote:

"At a meeting of our group here this week, we have advised Allpriser that, under no circumstances, do we wish any list changed in our Montreal area."

Questioned about this paragraph, Mr. Markey testified as follows:

- "A. That is a Council group.
 - Q. That would be a meeting of the Council?
 - A. Dealing with suggested resale lists.
- Q. What would be the mechanics of advising the issuer

of the Allpriser?

A. When we wanted a list put in we prepared our new list for our own catalogue and then formally sent on copies of the sheets to Allpriser to be included in his own catalogue." 17

According to the secretary of the Council, Mr. Chartrand, the Council classified accounts so that different levels of discount would apply to different customers. These classifications were decided upon at Council meetings. Lists of firms were drawn up, including an "A" list (later described as "Federal") and a "B" list (later known as "Provincial"). A third category was described as "Others" or "Municipal". As used in the plumbing trade, these terms seem to have a special meaning unrelated to their ordinary meaning. Customers were classed according to their paying record and volume of sales. 18 Generally the highest discounts (meaning the lowest prices) applied to customers classed as "Federal" who bought in the largest volume. A lower discount was accorded to firms in the "Provincial" list, and the least favourable discounts were extended to "Others".

There are indications in both the oral and documentary testimony that firms were added to or removed from these lists, or reclassified. ¹⁹ Also, D.S. Munro of Jamieson-Dansereau testified that the Council decided when discounts to particular customers of his should be altered. ²⁰ Mr. Simonovitch of International Plumbing and Heating Supplies Limited explained that the discounts suggested at meetings were published in bulletins referring to zones or areas of operation of the various Montreal jobbers.

According to an agenda for a meeting on February 26, 1959, territorial boundaries were to be discussed. 21 Because of freight cost differences, the Council's market area was divided into zone A which included the Island of Montreal and zone B which included a large district in the Province of Quebec surrounding Montreal. 22

An important question is whether these activities of the Council constitute an agreement concerning prices as alleged by the Director, or something less than an agreement as argued by various counsel for the defendants. On reviewing the evidence, the Commission finds that an agreement did exist. Bulletins issued by the secretary contained the results of discussions in meetings of the Council concerning discounts which would uniformly be allowed in conjunction with retail or list prices in recognized, published catalogues. Accounts were classified by the Council in discussions at the meetings. The list prices, discounts, and classes of accounts are spelled out in sufficient detail that manufacturers or wholesalers receiving the bulletins could act on them with the assurance that if other members did likewise the resulting prices would be uniform.

The substance of this is reflected in the testimony of Mr. Markey of Crane: 23

- "Q. In [Serial] 1800 in the third paragraph you say,
 "We have no problem in Montreal as it has been
 mutually agreed and the prices are uniform
 across the board. By whom had it been mutually
 agreed?
 - A. At the suggested resale level, by the Council.
 - Q. By the Council?
 - A. That is right."

In their testimony, a number of witnesses referred to the discounts published in the Council bulletins as "suggested" or "recommended" discounts, implying that they were not really binding upon the members. 24 What, then, were these suggestions for discounts based upon or intended to achieve? Several witnesses gave their opinion that the suggested discounts were maximum discounts beyond which they would be likely to suffer loss. 25

In the view of the Commission, it is quite possible that maximum discounts were recommended to the members as being exceeded only at the peril of financial loss, since the poor profit situation of the trade generally was one of the reasons for setting up the Council. Inasmuch as the costs of the members could be expected to vary, since some were small and some large operators, there is a fallacy in the hypothesis that the suggested maximum discounts would serve to indicate the breakeven point in each trader's operations. Yet this idea seems to have found acceptance among some of the members. As to the matter of the discounts being only "suggested" or "recommended", however, the Commission is not prepared to accept the oral testimony to this effect as there is strong evidence that the Council or its more powerful members took steps to enforce the suggestions.

The evidence shows that the duties of the secretary (or "secretary-manager" as he is described in the by-laws of the Council) included the inspection of books and of work in progress with a view to elimination of certain price-cutting. Mr. Chartrand did more than prepare agendas for meetings and circulate bulletins to members embodying the decisions of a meeting. Members of the Council were expected to report sales or commitments which they made at larger discounts than those recommended by the Council. Mr. Chartrand was questioned concerning a bulletin dated October 2, 1958, which listed "trade" and "semi-jobber" discounts for all Canadian made plumbing

fixtures listed in Alipriser, Crane, Omer De Serres, Emco, and Dominion Standard price lists, and also discounts for all Canadian-made plumbing brass in the same lists. He replied to questioning as follows:

- Were you also instructed -- I notice the bulletin has an effective date of October 1. Were you instructed as to that by the members?
 - A. Yes.
 - Q. And were you instructed on 'commitments and quotations to be submitted by October 9, 1958'?
 - A. Yes.
 - Q. What is the significance of 'commitments and quotations to be submitted by October 9, 1958'?
 - A. The significance is as directed in your question, it means that it was thought advisable or recommendable to establish that particular level of discount on those commodities, and obviously we had to ascertain that anything that had been sold or committed for at better than this discount had to be listed.
 - Q. I am reading 'commitments and quotations to be submitted by October 9, 1958'. To whom were those to be submitted?
 - A. To me.
 - Q. Did you in fact receive information along those lines?
 - A. I did, yes. " 26

Mr. Chartrand testified that he prepared lists, based on information supplied by members of the Council, of jobs on which special concessions had been given to contractors. The purpose was to eliminate special concessions and to reduce commitments on which they were made. The members advised Mr. Chartrand if one commodity or one job had been shipped completely or had been cancelled. On the basis of information he received, the secretary prepared detailed reports for the Council on the jobs being supplied by each wholesaler and the class of plumber involved.²⁷ The evidence

of Mr. R. De Serres was to the effect that the Council instructed Mr. Chartrand to visit certain jobs to check on the progress of the work, to see who had supplied plumbing and heating materials, and possibly to report on these matters. Mr. De Serres was questioned as to the reason for this check:

- "D. Et pourquoi l'association serait-elle intéressée à savoir qui avait fourni les matériaux pour un certain travail?
- R. Pour savoir comment les travaux allaient.
- D. Mais je vous ai demandé... Ma question est celle-ci: pourquoi l'association était-elle intéressée à savoir quels étaient les fournisseurs de matériaux pour un travail bien defini?
- R. Il y avait des suggestions qui étaient faites à différentes assemblées qui ne s'appliquaient pas à certains travaux en cours. C'etait pour voir si les travaux étaient encore en cours. Est-ce que ça répond à la question? Il y avait certains travaux en cours et certaines suggestions ne s'appliquaient pas à ces travaux-là et c'était pour constater si ce projet-là faisait partie des travaux déjà en cours."

Verification involved checking invoices, and there is evidence of Chartrand visiting members of the Council and plumbing contractors to ascertain whether a member was selling at a particular discount.²⁹

Mr. Chartrand also kept cards for the purpose of following up on various complaints. Mr. Noiseux testified that he had sometimes complained that other wholesalers were exceeding the maximum discounts. He asked Mr. Chartrand to make an inquiry. If the inquiry confirmed that the maximum discounts had been exceeded, Noiseux did not then ask Chartrand to take further steps, but rather granted his customer the same discounts. 31

The system of checking invoices and the progress of particular jobs and of reporting the results to the Council might in itself tend to check the spread of discounts which exceeded the maximum "suggested" by the Council. This would check violations of a "gentleman's agreement". In addition, there is clear evidence that the Council went so far as to agree to and carry out a boycott of Grinnell Company on account of discounts which the Council regarded as excessive. A letter from Mr. V.E. Vinen of Emco to Mr. W.C. Hawe

of the same company, dated July 11, 1960 reported on a meeting of the Council at which the boycott was discussed. One paragraph of the letter is as follows:³²

"Mr. Port was absent, but through Gerald Tessier, he reported on his meeting with Hall of Grinnell. Apparently, Hall of Grinnell stated quite flatly that he will continue to sell the semi-jobber and will sell him at a discount of 45%. He also stated that he will sell the plumber at 40%. Tessier was not clear as to whether the 40% discount will be offered to all plumbing concerns or just the accounts that we show on our list at 40%. Long discussions took place and the decision was made that we carry on as is. but we do so on a weekly basis. Each week the matter will come up and if business is falling badly because of this Grinnell move then further action will be contemplated. Total boycott of purchasing from Grinnell was recommended again and most members advised that this was in effect with them at the moment. They were all anxious to see Fittings Limited warehouse in action. The feeling that Fittings Limited and Crane plant will be penalized because of Grinnell's decision to sell semi-jobber at 45% whereas they will refuse to sell them came up. Of course, if some wholesaler was selling semi-jobber Fittings Limited fittings at 45%, they feel that Grinnell would not be quite as strong, however, finally agreed as mentioned above."

In summary, the Commission finds that the members of The Quebec Plumbing and Heating Council agreed in their meetings on the discounts that should be extended to particular classes of customer for particular products in the plumbing and heating lines. The discounts were tied to prices in published and recognized catalogues or price lists of particular manufacturers or in compilations such as Allpriser which listed the retail prices of products of a number of manufacturers. The discounts agreed upon in meetings of the Council were published by the secretary in bulletins circulated to the members. Any wholesaler in the market area covered by the Council could arrive at the precise price to be charged a particular customer if he had the following information: the class of the customer as recognized by the Council - Federal, Provincial, Municipal, or semi-jobber; the discount below list price shown on the bulletin for the appropriate product and class of customer; the retail price listed in the proper catalogue. The publication of a discount in a bulletin was intended to enable any seller of plumbing and heating supplies in the territory decided upon and marked out by the Council to arrive at a precise price to the customer. There is oral evidence that the discounts published in bulletins were only "suggested" or "recommended", and that

members may have felt free to exceed these maximum discounts (that is, cut the price). Yet the evidence as a whole shows a clear intent on the part of the participants in the Council to enforce their suggestions and to hold the line on price as far as it was in their power to do so. The Council sent the secretary to check on invoices and jobs with a view to eliminating or limiting special concessions to contractors on particular jobs. This work of policing and reporting carried on by the secretary appears to have been directed to holding the price line. In fact, the entire activity of the Council in relation to discounts was clearly aimed at maintaining prices at a higher level than they otherwise would be, and this objective is consistent with the reasons for establishing the Council in the first place, namely, to improve unsatisfactory profits in the trade. Additional evidence that the Council intended its "suggestions" to be followed is furnished by the boycott of Grinnell which the Council agreed upon and proceeded to carry out.

The Commission considers that an agreement is clearly established in the evidence. There is, then, the further question as to whether the agreement had the effect or tendency of lessening unduly competition in the distribution and sale of plumbing and heating supplies. The answer to this question revolves around the degree of control exercised by the Council over the sale of plumbing and heating supplies in its market area.

3. Statistical Evidence Regarding Degree of Control over the Market

The share of the wholesale market for plumbing and heating supplies which was controlled by the members of The Quebec Plumbing and Heating Council was not precisely documented by the Director in his Statement of Evidence. Nor is the Commission aware of any published statistics that would make possible the computation of the Council's share of the total sales. Nevertheless, there is oral evidence that all the recognized Montreal wholesalers were members of the Council. If all the wholesalers in metropolitan Montreal who were recognized as wholesalers by the principal manufacturers were members of the Council then, unless there is evidence of outside competition, it is apparent that the Council members must have accounted for the bulk of the sales of plumbing and heating supplies.

At the hearing before the Commission, defence counsel adduced statistical evidence designed to show amongst other things, that substantial competition from imports existed at least in certain product lines; that the level of profit earned by certain members of

the Council during the period of its operation were low; and that prices of "volume items" of plumbing materials declined in metropolitan Montreal during the period of the agreement. It was argued on the basis of these statistics that the Council did not have effective control over the market for plumbing and heating supplies and that prices were continuously under pressure of competition.

One table placed in evidence related to sales in metropolitan Montreal of all plumbing materials and also of "volume items", the "bread and butter items" or lower value articles which go into every residential housing development. The proportion of "volume items" to all plumbing materials in the years 1957, 1959 and 1961 ranged between 35.7 and 37.7 per cent. The Commission does not regard these statistics, though they include both imported and domestic materials, as delineating the full scope of the market covered by the activities of the Council. The territory covered by the Council's operations extended beyond the confines of metropolitan Montreal. Furthermore, in the absence of published statistics for metropolitan Montreal, it was necessary to produce estimated figures on the basis of company statistics and national statistics. 35

These limitations also apply to a second tabulation of "volume items" which shows the estimated import value of certain classes of these articles, in comparison with the total supply in metropolitan Montreal. For some of the classes, namely sinks, soil pipe and fittings, and solder joint fittings, import statistics were not available. In the case of lavatories and closets, imports formed an estimated 36 per cent of total supply in metropolitan Montreal in 1957, but for other major classes for which statistics were submitted, the share of imports was much smaller.

The Commission does not consider that the statistics of imports present any clear indication as to whether the Council was subject to significant competition from imports due to the possibility that the majority of imports may well have reached the ultimate consumer through the established wholesalers.

Additional statistics were prepared by Mr. Cowan relating to prices of plumbing materials in metropolitan Montreal in the period 1957 to 1960. In the table of price indexes, an attempt is made to compare the trend of prices of plumbing materials in metropolitan Montreal with the trend of prices in Canada as a whole. The series for Canada (described as "Price index numbers of residential building materials, plumbing and heating equipment") shows an increase in prices from the base 100 in 1957 year by year to 103.3 in 1960. On the other hand, all of the price index series for eight classes of products in the "volume items" group show a marked

declining trend over the period 1957 to 1960. The only exception is copper tubing, whose index declined sharply in 1958 but rose to 102.8 by 1960. If the series for Canada and for metropolitan Montreal were strictly comparable, one would have to conclude that prices of plumbing supplies generally declined in Montreal while they simultaneously rose throughout the country as a whole.

Mr. Parsons, counsel for Crane of Canada and for James Robertson Company drew this conclusion from the statistics:

"I think it is clear from the statistics and from Mr. Cowan's explanation that, one, contrary to the general indexes in the wholesale price indexes as compiled by the Dominion Bureau of Statistics there was in the District of Montreal a decrease in every instance, with the exception of copper tubing in these volume items. If that does not indicate the existence of very substantial competition which kept prices down, I would like to learn otherwise from other statistics."

The objections to this line of argument centre around elements of incomparability in the statistical series, and also around the interpretation of the statistics as proving existence of competition.

In the first place, the Canada index includes within it "non-volume" items as well as the "volume items" of residential plumbing materials. If the series were to be comparable with the statistics for Montreal, similar product groupings must be chosen. Otherwise, a rise in prices of non-volume items that outweighed a decline in prices of volume items across the country might cause the Canada index to rise. It would then be erroneous to conclude that the trend of prices was in the opposite direction in Montreal from what it was in the nation as a whole. Mr. Cowan, questioned on this point, could give no assurance that this could not be the case. Indeed, he stated that he did not know how the Dominion Bureau of Statistics index was constructed. ³⁷

Moreover, it cannot be deduced from declining price trends in the Montreal area that competition was either present or increasing. A change in consumer demand for the product, such as could result from the tapering off of a building boom, might produce the same effect. Or changes in costs of producing the articles in the "bread and butter" category could lead to changes in price even if consumer demand at any given price remained unchanged. No evidence was adduced that relates the downward price trend to any specific cause.

Furthermore, there is no way of knowing whether the price trend would have been identical if the Council had not functioned. Possibly the activities of the Council arrested the decline.

The Commission takes the view that the statistics of price trends as they stand permit no conclusion as to the existence or otherwise of competition.

Additional statistics were introduced in evidence at the hearing relating to the financial condition of various members of the Council. These statistics clearly pointed up the unsatisfactory profit position of some of the larger members of the Council. Statistics were submitted for the Montreal branches of Crane and James Robertson Company (now owned by Crane) and for the Montreal - St. Lambert wholesale branch of Emco Limited as compared with the total of all other Emco branches. Statistics were also submitted for The Garth Company (not charged in the first allegation) and for La Riviere Inc. In almost all instances net profits were low or else there were losses. The Montreal branches of Crane and James Robertson suffered losses in 1958 and 1960 and net profit was less than one per cent of the value of sales in 1959. Over the same period, Emco's net profit before income taxes was only 0.86 per cent of sales, a record less favourable than that enjoyed by other Emco branches whose profit averaged 3.52 per cent of sales in 1958 to 1960.

Referring to the low level of profits in Montreal during the period of the Council's activity, Mr. Hansard stated the larger members of the industry were surviving because they were doing better elsewhere than they did in Montreal. Speaking of the Emco profit statistics he said:

"... They are not broken down as between the industrial accounts and the bread and butter items, as somebody has called the other type of goods, but the fact of the matter is that on both of them, after this wonderful combine had been in operation for three years, they came up with a heavy loss. They were just not making enough money, they were losing money. If this had been an effective combine, if these people had had control of the market so that they could set prices to suit themselves, which is what the law is trying to prevent, they would have set prices . . . at a level where they would not be losing money. Surely." 38

Referring to the financial statements of Crane and Robertson, Mr. Parsons made a similar argument.

Low profits or losses can arise from any of a large number of factors unrelated to competition or control of the market. Losses may reflect excessive costs, whatever the control over the market may be. Even complete control of the market in plumbing supplies does not ensure the power to name both the price and the quantity that will be sold. A monopolist may control either price or quantity, but he is almost never in a position to set both the price and the total sales. Inefficient firms in a combine or those with an unfavourable cost position may lose money. And demand may slacken even in a monopolized market.

In explaining the financial statement of Emco, a witness for the company testified at the hearing as follows:

- "Q. I notice in your statement Exhibit M-7 there is a very substantial jump in the percentage of net income from 1960 to 1961. Can you give us any particular reason for that?
 - A. No, except you can see that it is in the costs of operation primarily. The margin improved. It was 15.37 and it dropped to 15.18. It is in the costs of operation which were 15.57 in 1960 and improved to 11.93 in 1961. I might suggest to you that some of the bad debt experiences in this industry, Montreal included, are catastrophic sometimes." 39

The Commission accordingly draws no conclusion from the profit statistics regarding the presence or absence of competition in the plumbing and heating trade in Montreal. Losses can arise in various ways and do not prove absence of control over the market.

4. Refusal to Sell Lingal, Inc.

Evidence given by various witnesses examined before the Commission dealt with instances where the Council or its members were accused of preventing wholesalers or semi-jobbers from obtaining plumbing supplies for resale. Evidence of refusal to sell and ability to block effectively attempts of other wholesalers to obtain supplies would be prima facie evidence of an exercise of control over the supply of plumbing materials. The boycott of Grinnell Company agreed upon and carried out by the Council has already been discussed. There were in addition some instances of smaller wholesalers being permanently cut off from receiving supplies from Canadian manufacturers.

Refusal to sell may stem from reluctance to deal with an unqualified wholesaler, or with one whose volume is so small that the business of selling to him is unprofitable. The wholesale business finds its basis and raison d'etre in volume dealings. It is reasonable to suppose that manufacturers or other wholesalers may refuse to sell at manufacturer's prices to someone who does not deal in sufficient volume or who does not provide customary wholesale services to his own customers.

Evidence that this was happening in the plumbing trade was provided by Mr. J.L. Elder, who in February 1958 assumed charge of the sales policy of Cello Products Limited, principally a manufacturer and jobber of brass solder fittings, 40 which cut off sales to a semi-jobber, Lingal Inc. Mr. Elder explained the changes which he made after he was brought in to revamp Cello's sales policy. Prior to his arrival, Cello had two salesmen on the road and several manufacturer's representatives working on commission. Use of commission agents, according to Mr. Elder, resulted in orders being taken from anyone requiring an item, rather than the accepted pattern of sales through channels which give the best results and a proper cost of sales. Mr. Elder found among Cello's accounts contractors listed by Cello as wholesalers. 41 In Mr. Elder's own words:

"... It does not take much to figure out that you can do without a manufacturers' agent and cover a thing like that very successfully and reduce your selling costs, and probably, through disposing of sales to contractors and other people who are not normally accepted by people in the industry as wholesalers, you will get better support from wholesalers who are doing an effective job of warehousing, estimating, and all the jobs that are supposedly carried out by the wholesale firm."

Mr. Elder testified that he eliminated over 40 accounts and achieved significant gains in sales and reductions in costs by confining his dealers to recognized wholesalers. Sales rose by more than 70 per cent, while selling costs were cut from five per cent of sales down to $1\frac{1}{2}$ per cent of sales. ⁴³ Cutting off sales to Lingal according to Mr. Elder's evidence was part of this revamping of sales policy. He replied to questioning as follows:

- "Q. Do you attribute the increase in sales by your company entirely to your dealing with so-called ethical jobbers?
 - A. To a tremendous extent, yes -- to a tremendous extent.

- Q. Why, because of goodwill?
- A. Because of goodwill. I have become quite well acquainted with the wholesalers across the country. I am on very friendly terms with them now. It is very easy, of course, for a man to come into an industry, a new man and say 'Well our company have been bad boys but now I am here to save you.' Perhaps I just took the easy route of doing my job.
- Q. And was that the main reason that you stopped selling to Lingal, that he was not a recognized wholesaler?
- A. That is right, yes."44

This evidence establishes the fact that an individual manufacturer might well have his own reasons for cutting off sales to certain customers even if there were no such thing as a plumbing and heating council. For the quite lengthy evidence relating to Lingal Inc. to be relevant, it would be necessary to establish that members of the Council, acting as part of the conspiracy, in order to lessen competition put pressure on Cello to cut off supplies to Lingal.

Mr. Philip Linder of Lingal Inc., a limited company, recounted the difficulties which his firm had experienced in getting supplies. The company was set up in 1950 and carried on a business in plumbing, building supplies, and electrical supplies affiliated with plumbing and heating. When the firm was set up, it was able to buy only from wholesale houses, not through manufacturers. Eventually, Lingal succeeded in buying directly from certain manufacturers, but never achieved general recognition by manufacturers in the plumbing and heating field. Although the company's credit rating was satisfactory. Mr. Linder testified that a number of manufacturers after selling directly to Lingal for a period of time cut off supplies and refused to continue selling to the firm. Noranda Copper and Brass cut Lingal off after selling to them for two or three years, no reason being given. After five or six years, La Fonderie St. Croix cut Lingal off although the firm was one of their biggest customers. Again no reason was given. After a year and a half, Wolverine Brass and Copper (or the Wolverine Tube Division of Calumet & Hecla of Canada Limited) refused to continue to sell to Lingal. Finally, Cello Products Limited in 1960 refused to sell although Lingal was a customer for six to nine years. Mr. Linder testified that his firm buys from Montreal plumbing wholesalers or jobbers only when it is desperate. It would not be possible for his firm to continue in

business if he had to buy from wholesalers exclusively, and under the circumstances Lingal must rely on imports even though the firm would prefer to buy from a Canadian manufacturer if that were possible. 45

The disadvantages of reliance on foreign sources of supply were explained by Mr. Linder. There is a consumer preference for Canadian products which affects his ability to do business. Lingal would have no opportunity to supply material for a job where the contract specified all Canadian material. Also, deliveries of supplies from foreign sources are slow. 46

Mr. Linder listed the names of other semi-jobbers who have experienced difficulties similar to his: Shafter Brothers, Arcade Supplies, and Paul's Plumbing. 47

Other evidence related the refusal to sell supplies to Lingal and Paul's Plumbing to representations made by other wholesalers, who were members of The Quebec Plumbing and Heating Council. S. Weinstein of Main Plumbing & Heating Supplies Co., a member of the Council, wrote to Harold Lee of Cello Products Limited on September 26, 1958 asking for a personal meeting. Written across the face of the document 48 in Mr. Lee's handwriting, as he admits, are the words, "Promised you or I would contact by phone on either Thurs. or Friday of this week. He wants Pauls, Lingals, etc. cut out completely". Mr. Lee turned the letter over to Mr. Elder, referred to as "you" in Lee's handwriting. "He" refers to Mr. Weinstein. 49

Apparently no action was taken as a result of Mr. Weinstein's request. Early in 1960, however, Mr. Elder according to his own testimony received a phone call from W.C. Hawe of Emco Limited, a competing manufacturer, who purported to represent a council of Montreal wholesalers. This was one of a number of instances where suggestions or representations were made to Mr. Elder by recognized wholesalers in Montreal that certain fringe firms be cut off or refused supplies. This is the only instance, however, where he refers to representations being made on behalf of a "group". Although Lingal was cut off by Cello not long afterward, Mr. Elder did not admit that his action was dictated by pressure from other wholesalers. 50

Mr. Hawe of Emco also made representations to another firm that cut off supplies to Lingal, Noranda Copper and Brass Limited. Mr. C.J. Ross, Montreal district manager of Noranda testified that he assumed that Hawe was representing a group of people. Afterwards, Mr. Ross issued instructions that Lingal be taken off the mailing list and deleted from all shipping records. Asked if the representations from Mr. Hawe caused him to stop selling to Lingal, Mr. Ross replied:

"It was the final straw that broke the camel's back, if I may use that term, Mr. Commissioner. As I explained previously, I had sold this company to our management and been under criticism because of their low volume. I had spoken to them roughly a year before and advised them that their purchases from us really did not warrant that they be recognized by a company such as ours." 52

Although the firms which cut off supplies to Lingal Inc. may have had their own reasons for doing so, it is clear that Cello and Noranda were both under some pressure from Mr. Hawe, acting on behalf of the Council or purporting to do so. It is this evidence of representations stemming from the Council that is germane to this report, since it indicates an attempt to lessen competition and in so far as they succeeded, a degree of control over the supply sufficient to bring about the lessening of competition intended.

5. Sullivan Company Limited Refused Supplies

This evidence is reinforced by that relating to two instances of pressure from Council members that effectively cut off supplies to Sullivan Company Limited, a small wholesaler. In one instance, Mr. Nadeau, president of the Mott Company, a member of the Council, succeeded in having the James Morrison Brass Company cut off supplies to Sullivan. In another instance, he and several other executives of firms that were Council members pressed Canadian Zurn Company to cut off Sullivan, and Zurn did so.

Sullivan Company Limited had been in business about two years at the time witnesses were examined in this inquiry in May 1961. The president, Mr. Lawrence J. Sullivan, had good connections with shipbuilding firms, and partly because of this was made a distributor for The James Morrison Brass Mfg. Co. Limited, which makes valves, gauges and similar products used in building ships and for other purposes. In April or May 1960, the Morrison Company told Mr. Sullivan that while he could continue to buy supplies for the shipbuilding industry, he could no longer act as a general distributor of these products. In Mr. Sullivan's own words:

"... Nobody was doing a job with Morrison valves in the shipbuilding industry so I still am a full distributor for Morrison in the shipbuilding industry only, not outside. I cannot sell valves to anybody; I can sell

them, but I cannot buy at a preferred discount that makes me competitive with my next door neighbour, you might say, to a plumbing account. I am not talking about the industrial accounts. 1153

Mr. Sullivan attributed the loss of his distributorship to actions of the members of the Council. He stated that he was taken off the list of wholesalers allowed the distributor discount of 20-20-5 and 5, and placed in the same discount class as a plumbing contractor who could buy only at a discount of 20-20. ⁵⁴ There is documentary evidence that Mr. Chartrand, secretary of the Council, on May 2, 1960, around the time that Sullivan was refused supplies at the lower discount by Morrison, issued a bulletin which stated in part:

"The firm of Sullivan & Company, 4616 St. Catherine Street West, Montreal, will now be sold at the municipal level.

EFFECTIVE DATE: April 29th, 1960." 55

Mr. Sullivan asserted that the Morrison firm acted after receiving a phone call from Mr. Nadeau of Mott Company. The coincidence of the Council bulletin and the phone call by Mr. Nadeau would seem to indicate that he was acting on behalf of the Council.

Mr. Earle Dunk, who had worked for Sullivan at one time and who previously worked for the Morrison firm corroborated Mr. Sullivan's testimony concerning pressure being applied by Council members to make Morrison cut off supplies. Mr. Dunk reported a conversation with the general sales manager of the Morrison Brass Mfg. Co. Limited in Toronto in which he was told that the Mott Company, James Robertson, and Garth were pressing Morrison to cut off Sullivan. Questioned about the pressure from these three distributors, Mr. Dunk replied as follows:

- "Q. Those were mentioned to you by the official to whom you spoke in Toronto?
- A. Yes. And how it was brought to bear was that Mr. Nadeau of the Mott Company actually approached Toronto and advised them if they did not take Sullivan off the distributors' list that he would return the stock he had on hand to the James Morrison Supply Company.

- Q. Did Mr. Nadeau speak to you?
- A. Yes, I was against it. I could not see any sense in it -- a man who had paid for his stock, Sullivan -- and we had no credit troubles with him He went up to Toronto and saw our Sales Manager and our President, Mr. Gardiner, and said if he did not take Sullivan off our list he would be forced to return his stock, he would keep a nominal amount of it but he would return 90 percent of it. So Mr. Harrison finally came down to Montreal to the Mount Royal Hotel a year ago April, and I was in there and, well. I was in a mood to resign right then and there because I could not see any point in it. He called Sullivan in and took him off the list and he advised Sullivan to return his stock to Toronto. . . .
- Q. When Mr. Nadeau was speaking to you did he say he was acting for himself or did he represent himself as acting for a group?
- A. The words I recall were that he was working for the Plumbing and Heating Association.

 These are the words I recall."57

About the same time, Sullivan Company Limited also lost its distributorship for Canadian Zurn. Sullivan was a full distributor for Canadian Zurn, selling chiefly their floor drains and roof drains. Sullivan gave Zurn over \$20,000 of business in a year and paid his account promptly. Just prior to the Morrison episode, Canadian Zurn decided to discontinue carrying their own stock in Montreal, and asked Sullivan as the distributor to stock it instead. An arrangement was arrived at whereby Sullivan would carry a representative stock, but would begin to do so only after he had moved to larger quarters down the street. ⁵⁸

After Sullivan had moved, he approached Zurn concerning the stock he should carry, but was told that Canadian Zurn would not sell to him at all. 59 Other wholesalers had told Marcel Payette, Montreal manager of Canadian Zurn, that they would not buy Zurn products if the company sold to Sullivan. Mr. Payette told Mr. Sullivan that within two days he had received phone calls from Mr. Markey of Crane, Mr. Kennedy of Jamieson-Dansereau, and Mr. Tessier of James Robertson Company, all members of the Council. As a result, Zurn ceased to sell its products to Sullivan. 60

Mr. Sullivan also testified that Canadian Plumbing & Heating refused to sell to his firm because of threats from other distributors that they would not buy from Canadian Plumbing & Heating if they continued to deal with Sullivan. 61

As a result of the refusal of these various firms to sell to him, Mr. Sullivan had to turn to other sources of supply. Although he continued to receive supplies from the Morrison firm for the marine end of his business (where the other wholesalers had no interest), Sullivan became an exclusive distributor for Newman-Hender, a company in England making pressed steel valves. He did not, however, seem to have found a suitable replacement for Zurn as a source of supply of drains. 62

From the evidence concerning Lingal and Sullivan, the Commission concludes that members of the Council acting on behalf of the Council, brought pressure on various manufacturers to refuse supplies to small wholesalers. The evidence shows that the Council reclassified Sullivan so that this firm would receive a less favourable discount from suppliers and so be unable to compete in lines in which wholesaler members were interested. The Commission considers these activities as part and parcel of the Council members' conspiracy to set uniform prices and discounts for customers in the market area which they served with a view to eliminating competition, raising prices above the competitive level, and improving their own profits. The abuses of the conspiracy are nowhere more clearly shown than in the pressure of members of the groups and threats which they used to force manufacturers to eliminate Sullivan as a wholesaler to the general plumbing trade.

6. Adherence to Discounts by Members of the Council

One aspect of the Council's control of the market in plumbing and heating supplies is its ability to enforce its will upon other sellers in the market who were not Council members. This we have just dealt with. Another aspect is the power of the Council to keep its own members in line. Failure to prevent price-cutting or breaches of faith by its own members does not prove absence of an agreement, as was suggested by some Council members at the hearing before the Commission. Evidence regarding the degree of adherence to the agreement, however, does cast some light on the way in which the agreement worked and the effect it had upon the public.

In examining witnesses from various companies, a representative of the Director asked each witness certain questions the substance of which was as follows:

- (1) Did the company receive bulletins from the secretary of the Council? (The answers to this question established that the bulletins were regularly sent to all the members of the Council).
- (2) Did the company implement the discounts recommended in the bulletins?
- (3) Did the company provide the Council or its secretary with information regarding special discount concessions to particular customers?
- (4) Was the Council a success?

In turn, the answers of companies to the last three questions will be reviewed in sequence. In regard to the third question, it has already been noted in this report that the secretary, Mr. Chartrand, visited jobs and looked at invoices in the files of certain firms to determine what discounts were actually being extended to customers by members of the Council.

The question as to implementation of the discounts recommended in the bulletins was answered variously by the executives of the member firms. T.G. Markey of Crane Limited replied to questioning as follows:

- "Q. Did you implement such discounts in your organization?
 - A. Yes sir.
- Q. Was the matter of the listing of certain firms in certain categories covered by bulletins from time to time? I have in mind A category and B category or federal, provincial or municipal lists?
- A. Yes.
- Q. Were suggestions contained in the bulletins in respect to the classification of those firms implemented by your company?
- A. Not in all cases.

- Q. Sometimes they were and sometimes they were not?
- A. That is right, sir.
- Q. Would there be particular reasons why they were not in the cases in which they were not?
- A. Because of competitive price situations which were in the field at the time and which we chose to meet. 1163

Most of the firms implemented the discounts contained in the bulletins at least part of the time. G.H. Tessier of James Robertson Company said that his firm "made an effort to" implement the instructions or suggestions in the bulletins. ⁶⁴ T. Nadeau of Mott Company Limited testified that he sometimes gave smaller discounts than were suggested in the Council bulletins, but that habitually he never exceeded these discounts. ⁶⁵ Pierre Deschenes of Deschenes & Fils Limitee gave evidence that as a general rule he sold either at the suggested maximum discount or at a lower discount. ⁶⁶

M. Prud'homme of A. Prud'homme & Fils Limitee also testified that while he did not use the Council lists, as a general rule the discounts his firm gave were lower than those suggested by the Association, and he did not recall an instance where a higher discount was given. ⁶⁷

According to B. Simonovitch, however, International Plumbing and Heating Supplies Limited did not follow all of the suggestions made in the meetings; as with most of the jobbers, there were definitely instances where he used his own judgment. The firm of L.N. & J.E. Noiseux Limitee, according to J.P. Noiseux, usually adhered to the maximum discounts, but sometimes gave a smaller discount or sometimes exceeded the maximum. John Wright of Canadian Plumbing & Heating Specialties Limited stated that in some cases his firm adopted the discounts suggested in bulletins, but not always. R. De Serres of Omer De Serres Limitee stated that there were cases where his company had modified certain discounts after receiving bulletins from the Council.

Certain other witnesses, however, stated that they did not use the Council's suggested discounts in establishing their prices. Marcel Drouin of Marcel Drouin Limitee testified that he did not use the suggestions made in Council meetings as a basis for determining his discounts. 72 Sidney Weinstein of Main Plumbing & Heating Supplies

Co. stated that he never changed his discount cards through instructions from anyone else. Dealing with smaller volume buyers, Mr. Weinstein felt that his firm was in a different category from the large supply houses who were "competing tooth and nail . . ." and who could afford to give larger discounts. He said that his firm would give the discounts it could afford, influenced by competition and by the desire to obtain or hold an account. 73 N. Malo of Nelco Supplies Limited, a member of the Council, asserted that the discounts in bulletins issued by the Council were of no concern to his firm. Usually the prices charged to customers by his firm were higher than those suggested by the Council. 74

P. Pressman of Ideal Plumbing Supplies Ltd. minimized the effects that suggested discounts in bulletins issued by the Council could have on the discounts actually allowed in his business:

- "Q. Did you in your firm change any of your discounts as a result of information received from the secretary's office?
- A. I might point out to you that in our industry discounts constantly change and vary. The plumbing industry is using metals which are highly sensitive to the world market, as for example, copper which has a daily rating like the stock market. This necessitates constant changes of prices which sometimes reflect themselves in list prices and at other times they may reflect themselves in additional discounts. But they constantly change, Council or no Council, because that is the only basis on which the industry could operate. Otherwise no one would know from day to day what the price is.
- Q. I was wondering if, as a result of information received from the Council, you had changed the discounts allowed to particular firms?
- A. In view of what I have just stated, I can say that it had very little effect on changing discounts because of the suggestions at the Council meetings."

Mr. Pressman went on to explain that it is normal to classify accounts in the plumbing trade, Council or no Council, because it is normal practice to base discounts on volumes purchased from that firm. ⁷⁶

On balance, the evidence from the Council members themselves indicates a general readiness to follow the discounts recommended by the Council in the bulletins, but also a widespread tendency to depart from them. If these discounts were intended as maximum discounts, as some of the evidence suggests, then granting of lower discounts would not be considered by Council members as a violation of the agreement. In addition, however, some of the Council members admitted that they did exceed the discounts set forth in the bulletins.

The Council did attempt to limit these special price concessions as far as possible. The activities of Mr. Chartrand in this respect have already been reviewed. Also, representatives of a number of firms testified that they had given Mr. Chartrand information regarding special discount concessions to particular customers.

Mr. Simonovitch of International Plumbing and Heating Supplies Limited recalled reporting to the secretary of the Council information on various plumbers that he was selling merchandise to at better than the suggested prices. 77 Also, Mr. Tessier of James Robertson Company provided the secretary with information relating to specific accounts and specific jobs where the company hoped to procure or had procured businesses at a special price. 78 Similar information was also submitted to the secretary by Ideal Plumbing Supplies Ltd. 79

Mr. Markey of Crane gave further information about the collecting of returns relating to special price concessions. The Council had asked Crane (as well as the others) for a "list of jobs on which extreme prices had been given", in the hope of eliminating quotations at or near cost. Information was submitted by Crane in response to this request about February or March 1960. In turn, Crane received information from the Council based on information submitted by the group of firms. 80 Mr. Port of La Riviere Inc., whose firm also submitted information for this survey, said that Mr. Chartrand compiled a statement based on the information each member of the group had given him, and that he would report to the members the number of jobs going on in the City of Montreal which a stated number of wholesalers had taken at or near cost. He said, however, of the Council's efforts to eliminate special prices that the Council "could not accomplish anything" and that the number of concessions remained the same. 81

In spite of the efforts of the Council to eliminate special discounts, price-cutting appears to have continued. In the evidence of witnesses examined there are many references to the

failure of the Council to live up to its members' expectations. Mr. Markey of Crane said that the Council accomplished "Nothing". The company apparently considered withdrawing "Many times". 82

Mr. R. De Serres labelled the association as "an unsuccessful experiment with very few good results" ("C'a été une mauvaise experience avec tres peu de bons resultats").83

The disappointment in the achievements was fairly general and there is no need to refer to further evidence of it. The reason for this lack of success was in large measure the tendency of some members to cut prices in order to secure business from their competitors. Although there is evidence of instances where firms were boycotted (Grinnell) or refused supplies (Sullivan, Cello and others), the Council did not succeed in its attempts to police the activities of its own members.

At the hearing before the Commission, Mr. Tinkoff, counsel for International Plumbing and Heating Supplies Limited, argued as follows:

"Incidentally I have not come across any indication as to what would happen to a member if he refused to follow these suggestions reached at the meeting. I think it is because there was simply no provision for dealing with a recalcitrant member. Mr. MacLeod has referred to this, or rather the Director has referred to these members as acting in bad faith. I hardly think that is a proper description. I think it is because of the independence which they reserved to themselves. It is this independence which they followed that the Director refers to as bad faith. Rather I would refer to it as evidence that there was not in fact an agreement to eliminate unduly competition."

In rebuttal, Mr. MacLeod contended that the agreement, even if not entirely successful, did meet with a substantial measure of success. He also referred to the comments of the Director in the Statement of Evidence relating to the degree of success achieved by the Council. 85

Several sentences in passages to which Mr. MacLeod referred in the text of the Statement may usefully be reproduced:

"... In general the witnesses said that the Council was not a success but it seems clear that by this they mean that it was not possible to operate a tight price-fixing arrangement under which prices at the wholesale level were always those set by agreement among the members of the Council. Most witnesses said that some of the agreements reached at meetings were put into effect. There were cases where the competition of imports or a breach of faith by a member or members of the Council weakened the effect of particular agreements on specific matters. But viewing the evidence as a whole, it is suggested that the only reasonable conclusion is that the agreements and arrangements made among members of the Council were designed to and did substantially affect competition among the wholesalers in Montreal..."

The Commission is satisfied that the agreement existed, that in many instances it was effective, and that efforts were made by the Council and many of its members to make it effective. If it was in the nature of a gentleman's agreement among the members, it was no less an agreement for that. Certainly in dealing with outsiders the Council members did not shrink from boycott or pressing manufacturers to cut off supplies in product lines that interested them. From the standpoint of legality, the degree of success achieved is unimportant. From the standpoint of the public interest, the harm may be less if success was limited, but harm still exists.

7. Exceptional Circumstances

In a few instances, it might appear that members of the Council were not actually participants in the conspiracy. At the hearing before the Commission, Mr. J.A. Prud'homme, representing A. Prud'homme & Fils Limitee, argued that the mere fact of membership in the Council cannot justify an allegation such as the Director makes against the members in his Statement. Mr. Prud'homme said:

"... I submit that if a member of the Council, a registered member of the Council, a member who regularly pays his dues, if he has not participated in any activity of the Council, any real activity which might lead to a so-called conspiracy, and has not committed any act prohibited by the statute or the Criminal Code, he cannot be charged as having conspired. A passive member of the Council is not a conspirator. He must do something himself. He may listen, but so long as he does not do any act not permitted by the statute or the Criminal Code he cannot be charged with conspiracy." 8?

When examined as a witness, Mr. M. Prud'homme, president of the company, stated that his firm did not use the Council lists, though he admitted that he did not recall giving a higher discount than those suggested in the bulletins. He also stated that his firm was not sufficiently involved in the plumbing and heating business to profit from the Council's activities. His firm was not interested in the same type of customers as plumbing and heating wholesalers in general. Nor did Mr. Prud'homme attend enough meetings of the Council to recognize a connection between material in a Council bulletin and discussions in Council meetings. 88

Mr. A. Prud'homme, counsel for the firm, at the hearing pointed out that the company he represents is a wholesale hardware firm, which does carry a certain amount of plumbing and heating supplies for sale to retail hardware merchants. The other class of customer served by the firm is religious institutions. Also the company has very few -- two or three -- industrial accounts. Mr. Prud'homme asserted that at most only one per cent of the company's business is in plumbing and heating supplies sold to plumbing contractors. As a dues-paying member of the Council, A. Prud'homme & Fils Limitee did receive lists from the Council, but they were of no use, since they related to large plumbing contractors with whom the firm did no business. 89

The Commission concludes from the evidence that A. Prud'homme & Fils Limitee had a limited interest in the type of business covered by the activities of The Quebec Plumbing and Heating Council, and the company did not stand to gain in any noticeable degree from the agreement of the conspirators to maintain uniform prices in the sale of plumbing and heating materials. Nevertheless, the Commission does not consider that the company can be exonerated completely: they paid dues for the support of the Council, a group which met chiefly to discuss illegal pricing arrangements; they attended meetings often enough to appreciate the general nature of the Council's activities; they did not exceed the maximum discounts suggested by the Council, and the president knew enough about those maximum discounts apparently to give evidence on that point. A business firm, no less than an individual, should be careful of the company it keeps.

The evidence concerning Nelco Supplies Limited, a member of the Council, seemed to indicate that the firm joined the Council only to find out what was going on, that the firm did not benefit from membership, and that it did not base its discounts on the bulletins issued by the Council. 90 The reluctant membership of Nelco evidently persuaded the Director not to include Nelco Supplies Limited in the allegations. According to the evidence, the firm did pay dues, its president did attend meetings sometimes, but all with reluctance. The

Commission recognizes that some associations are easier to join than to leave, and does not quarrel with the Director's decision to omit Nelco.

Regarding the activities of the Council as a whole, there is evidence in Mr. Chartrand's testimony to the effect that the Council altered its agenda once the present inquiry began, to minimize the prominence of references to prices and discounts. 91 Also, the secretary, Mr. Chartrand, testified that the members themselves thought that they might be acting illegally. He replied as follows in response to questions from the Director's representative:

- "Q. Do you have any knowledge of why the Council was disbanded, or was that something that was decided by others?
 - A. Do I have any knowledge as to the reason why?
 - O. Yes?
- A. Because the point, in my candid opinion; the point was driven home to each and every one that the ways and means that we had taken to salvage some of the profit that normally should belong to that industry were not legal, amongst other things."

CHAPTER III

THE "INDUSTRIAL GROUP"

1. Sales to the "Industrial Accounts"

The second allegation which the Director makes (and it is separate from the first) is that there was an illegal agreement in the distribution and sale of plumbing and heating supplies to the so-called "industrial accounts" in the City of Montreal and elsewhere in the Province of Quebec. ⁹³ As the Director noted in his Statement, the "industrial accounts" are customers who buy for their own use rather than for resale. Because of the volume of their purchases, however, they buy on a preferred basis. These accounts can only be properly served by certain of the larger distributors because their requirements for materials are so varied and their need for prompt service so important. ⁹⁴

Six firms are alleged by the Director to have participated in the illegal agreement. Of these, Crane Limited, Emco Limited, The James Robertson Company (Limited) and La Riviere Inc. were members also of The Quebec Plumbing and Heating Council. Two of them, The Garth Company and Grinnell Company of Canada Limited, were not members of the Council. Although there was a degree of common membership in the Council and in the group of firms selling to industrial accounts (hereafter for the sake of convenience referred to as the "Industrial Group"), the two organizations were separate. The reason, according to the evidence of Mr. Tessier of James Robertson Company and Mr. Port of La Riviere Inc., was that the Council was concerned with sales to the wholesale plumbing and heating trade while the Industrial Group consisted of the principal firms selling to the industrial accounts. Garth and Grinnell were not, according to Mr. Port, interested in "actual plumbing materials" and so were not members of the Council.

There is considerable oral and documentary evidence that the firms principally interested in selling to industrial accounts met to discuss the discounts which should be allowed to particular accounts, and as a result of their meetings published an "industrial list" which was circulated among themselves. Discounts on the list

were coded, but to the initiated they clearly indicated a certain definite discount to be given a specific firm on sales of a specific group of products, and this discount would have no meaning unless it was understood to relate to a commonly known list price; there is no point to publishing a discount unless there is an understanding of what the price is on which the discount applies. Possessing the key to the code, a member of the Industrial Group would know exactly what to charge a particular customer.

Mr. John Hall of Grinnell Company of Canada Limited testified that he had attended meetings at which these lists were discussed as far back as 1945. At that time the members were Grinnell, Crane, Garth, James Robertson, and also Thomas Robertson which was bought out by Emco. La Riviere Inc. joined later. The older lists published by the Industrial Group (up until January 1960) embraced fittings and nipples, iron pipe, and certain valves. More recently copper tube, solder fittings, pipe hangers, and certain brass pipe and brass fittings were added to the list. Mr. Hall's explanation was that the list was extended to include copper as it became more popular in the industry. 97

From late 1954 or early 1955, the lists were prepared for circulation and amendments were sent out by a secretary, Mr. Leslie A. Osmond, a manufacturer's agent who operates Osmond Agencies Ltd. None of the firms for whom he acted was concerned with his work as secretary of the Industrial Group. 98 According to Mr. Osmond, at the group's meetings he made notes of proposed changes in the industrial list, and then sent them out as confirmation. There was sometimes an absence of agreement in a meeting, and it then appears that Mr. Osmond might then circulate the largest discount suggested:

- "Q. If the representative of A company said, 'I am going to allow 50 per cent' and the representative of B company said, 'I am only going to allow a discount of 45 per cent', in that circumstance would you send out the 50 per cent? Of course this is entirely hypothetical?
- A. Yes, I think it [sic] would. It would then be up to the other people to do as they pleased." 99

Mr. Osmond said that up to the end of 1959 the meetings were very infrequent, but that it was then the intention to try to hold them more often. Although the secretary attempted to call meetings in 1960 every month or twice a month, "it did not seem to work out that way". 100 The meetings were not held in any particular location, and they might take place in an office, a hotel, or a golf club. 101 Amendments to the industrial list were not always the result of a meeting; one witness testified that he had on occasion phoned Mr. Osmond to suggest certain amendments to the existing list. 102 Mr. Osmond did not, however, have wide discretion over changes in the list as the following testimony of Mr. Tessier of James Robertson Company makes clear (He was questioned concerning a letter dated December 9, 1959 sent to James Robertson Company by Mr. Osmond noting certain "changes and additions to your Montreal Industrial List, effective immediately" [Serial 1474]):

- "Q. What would be the significance of him [Mr. Osmond] writing James Robertson about a change in the industrial list?
- A. He was requested to send a note to us and some others.
- Q. Who were the others, do you know?
- A. Yes; it would have been the Crane Company, Emco Limited, Lariviere, Grinnell Company and the Garth Company.
- Q. Did Mr. Osmond independently make decisions as to the industrial list?
- A. No.
- Q. How were the decisions, as requested in bulletin 1474, arrived at?
- A. They were agreed to.
- Q. Among the people that you have named?
- A. Yes." 103

From this evidence of one of the participants in the Industrial Group, it would appear that there was an agreement among them concerning discounts to be accorded to particular industrial accounts for particular products. It remains to consider the degree of control exercised by the members of the Industrial Group over the market, and what the effects of the agreement were upon competition.

2. Degree of Control over the Market

From the testimony of an executive of another participant, Mr. Le Marquand of The Garth Company, it appears that all of the significant wholesalers selling to industrial accounts in Montreal were members of the Industrial Group. 104

This testimony is corroborated by certain evidence of executives of all the firms who were not in the Industrial Group but who were members of The Quebec Plumbing and Heating Council against whom the Director made allegations. They were questioned by a representative of the Director concerning their interest in selling to industrial accounts. Six firms replied that they did not sell to large industrial accounts at all and were not large enough to obtain such business: International Plumbing and Heating Supplies Limited; Craig Plumbing & Heating Supplies Co. Ltd.; Ideal Plumbing Supplies Ltd.; L.N. & J.E. Noiseux Limitee; Mott Company Limited; Main Plumbing & Heating Supplies Co. 105 The remaining six firms stated that a relatively small proportion of their business was with industrial accounts: Jamieson-Dansereau Limited; Canadian Plumbing & Heating Specialties Limited; Omer De Serres Ltee; Marcel Drouin Ltee; A. Prud'homme & Fils Limitee; Deschenes & Fils Ltee. 106 In addition, Nello Malo of Nelco Supplies Limited (a member of the Council not included in the Director's allegations) testified that his firm sold very small amounts to large firms but considered these as courtesy sales rather than industrial sales. 107 All of this evidence leads to the conclusion that these firms were either not interested or not equipped to service industrial accounts; there is no suggestion that their competition in this area of business was prevented by the Industrial Group.

Although the six firms in the Industrial Group did not face competition in the natural course of events from other wholesalers in Montreal, there was an alternative possibility. Firms from outside Montreal might successfully compete with local firms in supplying the industrial accounts so that the Industrial Group could not exercise effective control over the market or appreciably lessen competition. Mr. Walker, counsel for Grinnell, urged this view upon the Commission. He said:

"... I think it must be obvious to everyone that these large industrial accounts are national firms having branches for the most part all over the country. I am thinking of companies like Imperial Oil or the paper companies and so on. They are perfectly free to get a quote in Toronto or Montreal or Ottawa or anywhere else. They may not be able to have more than these particular six firms sell them where they are located in Montreal, but that does not mean that they cannot get a quote from other cities. They are national firms."

The answer to this argument, that the Industrial Group could not have controlled the Montreal market for plumbing and heating supplies sold to industrial accounts, is to be found in the evidence given by Mr. Tessier of The James Robertson Company (Limited). His testimony indicates that while the group may not have succeeded in maintaining the agreed prices to every account in the face of outside competition, such competition did not cause the list to break down (and indeed the Industrial Group did achieve some results). When questioned by the representative of the Director, he replied as follows:

- "Q. Let me put it this way. Was this group sufficiently in control of that branch of the trade to set discounts for different products and have them adhered to?
- A. To a certain extent, yes.
- Q. This list then produced some results?
- A. That is right.

- Q. Would you say that on occasion it was departed from?
- A. Yes.
- Q. Was that because of bad faith, if I might express it that way, on the part of some members or because of outside competition?
- A. If you would use a little different word I would agree -- Bad faith?
- Q. Occasionally a member would have departed from it?
- A. That is right.
- Q. Did you find that your list on any occasion broke down because of outside competition?
- A. Not the list, certain accounts.
- Q. You are still maintaining this system of preparing these lists?
- A. Yes.
- Q. And you feel you are achieving something with them?
- A. Some limited results." 109

Further oral evidence supports the conclusion that there was a pattern of general adherence by the members of the group to the Montreal Industrial List. For example, John Hall of Grinnell Company testified as follows in reply to questions put by the Director's representative:

- "Q. In selling do you allow the discounts which are set out on the industrial list which is currently in use?
- A. Do we follow this list religiously?
- Q. Yes?

- A. I would say a good percentage of the time. It certainly is not adhered to 100 per cent. I do not want that impression to get out; it is not.
- Q. In your experience do you find that other companies that you have listed or named a few moments ago, that they observe the list or follow the list?
- A. Yes.
- Q. Do they follow it to some extent?
- A. To some extent as a general habit, as a general pattern.
- Q. As a general pattern to which there are exceptions?
- A. Yes." 110

That La Riviere Inc. might have accounted for some of the exceptions to conformity to the list is suggested by a reply of Mr. Port of that company to a question from the Director's representative. Shown a copy of a Montreal Industrial List, he stated that he would use it if it were to his advantage; otherwise, he would not. 111

Evidence that members of the Industrial Group cut prices from time to time was provided by Mr. Le Marquand of The Garth Company. He stated that his experience with the six firms following the discounts suggested was not very good. Prices were cut below these levels especially when the volume of business was generally poor. In a good year there would probably not be a lot of price-cutting, but he said that at the time he was being examined business was such that prices might be cut "two or three times a week". In his opinion, price-cutting was more prevalent on large orders than on small orders. 112

Both the content and tone of the evidence make it quite clear that the Montreal Industrial List was an agreed upon set of discounts which was maintained with modifications of various kinds by the members of the Industrial Group over a long period of years. If the list of discounts was departed from, it nevertheless was recognized as a norm. The fact that there were no provisions for

enforcement or for sanctions against offending members, and the evidence does not reveal any, does not lead the Commission away from the conclusion that there was an agreement. The agreement was among a small group of firms who had the necessary facilities for meeting the peculiar and unusually demanding needs of the industrial accounts. And further, it was a small enough group that each member must easily recognize that any action he took to cut prices would usually lead the other members interested in the same business to cut their prices too. This common recognition that one person's price-cutting would lead to further price-cutting by others was the only sanction that was needed to make the agreement generally effective.

Mr. Hansard, counsel for Emco and for The Garth Company, at the hearing before the Commission argued with relation to the Industrial Group (as he had regarding the Council) that low profits or losses by the members proved that there was no effective combine. 113 Certainly the operating results of The Garth Company in the years 1958 to 1961, introduced in evidence at the hearing, must have disappointed the proprietors. Nor would the annual financial results of the Emco Montreal branch, including the industrial and other sales, likely bring satisfaction to the management. (We do not know how these firms fared in other years that the Montreal Industrial List was in effect.)

In any event, the Commission is not persuaded that the losses sustained by these firms are proof that there was no effective agreement in those years. Losses may result from a variety of causes, as was pointed out earlier in this report. And there is no way of telling what the operating results would have been in the absence of any agreement at all. It is safe to conclude, however, that the discounts arranged by the Industrial Group amongst themselves were designed to raise prices not to lower them, to stabilize the market against price-cutting, and to thereby arrange larger profits for themselves than they would otherwise enjoy in a state of unrestricted competition.

The clear intent of the arrangement to circulate the Montreal Industrial List and amendments to it among the members was that they should abide by the discounts set forth there with such precision as to indicate a set of uniform prices. Competition among the six, the only firms in Montreal capable of serving the industrial

accounts, was thereby eliminated except in so far as the members broke the agreement. Sales of other Montreal wholesalers to industrial accounts did not form a substantial part of these firms' business nor did these sales appear to be capable of much expansion. The competition of wholesalers located outside Montreal was insufficient to break the discount structure of the Industrial Group. That the Montreal Industrial List was reasonably effective is indicated in part by its long life; in one form or another it operated for at least fifteen years. If the Industrial Group was such a loose organization that it had no formal name (the term "industrial group" probably appearing first in the course of this inquiry), and if meetings of the members were infrequent, it is only because amongst the small membership formality and frequent meetings were unnecessary.

CHAPTER IV

CONCLUSIONS AND RECOMMENDATIONS

1. The Issue of Undue Lessening of Competition

Defence counsel at the hearing before the Commission argued, if there was any lessening of competition as a result of the activities of The Quebec Plumbing and Heating Council, it was not "undue" within the meaning of the law.

Mr. Hansard stated that while the essence of the offence of conspiracy is in agreeing, one must look at the way the law has been interpreted. He referred to the judgment of Mr. Justice Cartwright in the case of <u>Howard Smith Paper Mills</u>, Ltd. et al v. The Queen, in which he said:

"In essence the decisions referred to appear to me to hold that an agreement to prevent or lessen competition in commercial activities of the sort described in the section becomes criminal when the prevention or lessening agreed upon reaches the point at which the participants in the agreement become free to carry on those activities virtually unaffected by the influence of competition, which influence Parliament is taken to regard as an indispensable protection of the public interest; that it is the arrogation to the members of the combination of the power to carry on their activities without competition which is rendered unlawful; • • • " 114

Counsel argued that in view of these comments by the learned Justice, the conclusion reached by the Director in his Statement of Evidence that "The Quebec Plumbing and Heating Council had substantially lessened competition . . ." 115 would not sustain an allegation that the Council "unduly" lessened competition. He argued that "substantial" lessening is not sufficient to constitute "undue lessening" of competition. 116 Counsel went on to assert

that the Council members were faced with competition from a great number of people on the fringes of the plumbing business, such as semi-jobbers. They argued that a seller does not have to be big to make trouble in the plumbing business. The Commission would refer to the decision of Mr. Justice Batshaw in the Abitibi case in which he questioned Mr. Justice Cartwright's view in the following words:

"I conclude, therefore, that it cannot be accepted as our law that only those conspiracies are illegal that completely eliminate or virtually eliminate all competition. To say that the prevention or lessening of competition must be carried to the point where there remains no competition, or virtually none, is tantamount to considering the words 'prevent' or 'lessen' as synonymous with 'extinguish'. Giving to words their ordinary meaning, it would seem that what the legislator intended by 'prevent' or 'lessen' is something less than 'extinguish'. This view was approved by Mr. Justice Kellock in the Fine Papers case . . . when he pointed out that the word 'prevent' is used sometimes in the sense of 'hinder' or 'impede', just as the word 'prevenir' in the French version is commonly used in the sense of 'empecher', " 117

It is clear that all of the Montreal wholesalers recognized by the Canadian manufacturers were included in the agreement. Competition from imports or from outside firms was present, but the advantage in the market of Montreal wholesalers selling Canadian goods was apparently such that the participants in the agreement were not greatly influenced by competition from outside their own ranks. Under the conditions which actually prevailed during the years that the agreement was in effect, there was virtually no outside competition that could force the Council to give up its restrictive pricing practices in regard to the bulk of its sales. Within its own ranks the Council may have found some wavering, but if those ranks held firm the Council had virtually complete power to enforce the terms and prices which it did in Montreal and elsewhere in the Province of Quebec.

2. The Allegations:

(a) Charles E. Chartrand

The secretary of The Quebec Plumbing and Heating Council, Charles E. Chartrand, is alleged by the Director in his Statement of Evidence to have been a party to the conspiracy, inasmuch as he performed much of the detailed work in connection with its operation. Similarly, Leslie A. Osmond is alleged to have been a party to the separate conspiracy of the firms selling to industrial accounts.

A somewhat similar situation arose in the Metal Culverts report. 119 In this report the Commission concluded that the secretary of the Western Section of the Metal Culvert Council, Thomas Sill, was not a party to the conspiracy which the Commission found existed. In that case the secretary's role was largely mechanical and clerical, and consisted mainly of working out detailed lists of prices incorporating changes decided on by the Western Section and of circulating these lists and other pricing information. Although he must have known something of the purposes for which the material was distributed, the Commission concluded, he should not be held responsible for any of the arrangements and practices of the members of the combine.

The duties of Charles E. Chartrand, secretary of The Quebec Plumbing and Heating Council from August 1958 to January 1961, included some that were similar to those of Thomas Sill as revealed in that earlier inquiry to which the Director's representative referred. According to his own account, Mr. Chartrand prepared bulletins on instructions of the members of the Council which related to discounts discussed in Council meetings. He also, however, received information from members of the Council concerning sales and commitments on which the suggested maximum discounts had been exceeded. He prepared the agenda for meetings of the Council, sometimes receiving instructions from the members concerning the items which should be placed on the agenda, but sometimes preparing an agenda of his own. Also it was his custom at the beginning of a meeting to read an account of what had taken place at the previous meeting. 120 A copy of the "Secretary's Remarks" for the meeting of April 16, 1959 was placed in evidence. 121 An extract from these Remarks may give some indication of the secretary's attitude toward the members of the Council:

"This Council has come a long way since that day in August 1958 when you decided to meet weekly to try and improve the chaotic conditions prevaling in your industry.

You have all given of yourselves to consolidate this group and the many problems that have come up were handled with patience, an open mind and a spirit of compromise.

Last week, you have unanimously agreed to dispose of the contentious question of residential bookings.

This last decision is going to create problems of its own and will very likely test your patience.

One feature stands out vividly at this point and I feel compelled to set it apart on this day.

- We must meet weekly, and the day best suited to each member is Thursday afternoon at 1:30 P.M. at this hotel.
- 2. Every firm must be represented at each meeting.
- 3. A representative replacing a member must report on deliberations to his superior as thoroughly as possible.

Our weekly meetings are essential to the solidarity of your Council. If one or more members cannot attend, the proven results are that the same questions keep coming back for discussions". 122

The tone of these remarks is definitely not that of a hireling. Yet Mr. Chartrand was a paid employee of the Council. Extracts from his date book in the fall of 1958 indicate that he was paid a salary of \$192.30 per week. 123 According to Article IX of the by-laws of The Quebec Plumbing and Heating Council, the Council employed a "secretary-manager" whose duties included correspondence, notices of meetings, change of offices and records including collection of fees and payment of accounts, keeping minutes, and preparation of a monthly statement of receipts and expenses for the treasurer. Also, the by-laws stipulated: "He shall perform such

other duties as may be assigned to him by the Executive Committee of the members". 124 Although Mr. Chartrand is nowhere described in the evidence as "secretary-manager", it would seem that this was the post that he held. At one point in his evidence he refers to himself as a "member of the Council", although in the same sentence he mentions "directives that were given to me". 125

Mr. Chartrand actually was not a member of the Council, but he thoroughly understood its purpose and assisted in making it effective. Evidence was cited earlier concerning his activities in checking invoices and progress of work at particular sites and investigating complaints. Clearly if Mr. Chartrand's duties were those of a secretary, they were also those of a manager.

(b) Leslie A. Osmond

Mr. Osmond, secretary of the Industrial Group late 1954 or early 1955, relied for his defence upon a written brief dated May 16, 1963 which he submitted to the Commission. In his brief he stated that he was in business for himself as a manufacturer's agent and had been hired to act as recording secretary of the Industrial Group because of his working knowledge of the industry. He stated further that to his knowledge the group was "... not meeting to arrange to sell their products at higher than market prices, but to endeavour to maintain a floor level beyond which they could not sell without losing money". Mr. Osmond's salary was \$10 per month per member of the group, or a total of \$60 per month. Regarding his duties, he stated in his brief:

". . . for this amount, my duties were no different than they would have been, were I a public stenographer".

The Commission considers that the evidence relating to the Industrial Group establishes that Mr. Osmond played no part in the planning or the operation of the conspiracy. He evidently knew about the intended function of the Montreal Industrial List to circulate changes on occasion without having detailed instructions to do so from a meeting. 126 Yet his role was a limited and subsidiary one, for which he was paid a nominal amount. His

duties were certainly no more extensive than those of Thomas Sill in the Metal Culverts group, referred to previously.

(c) The Wholesalers of Plumbing Supplies

In summary, the Commission finds that there were two separate conspiracies relating to the distribution and sale of plumbing and heating supplies in the City of Montreal and elsewhere in the Province of Quebec. The illegal agreement among the members of The Quebec Plumbing and Heating Council relating to these materials sold at wholesale by sixteen or more jobbers chiefly to plumbing and heating contractors, was intended to fix uniform prices through the medium of published discounts to be applied to commonly recognized lists of prices. The agreement among the six members of the so-called Industrial Group related to sales of plumbing and heating supplies to large firms with special needs as to volume and service who were known in the trade as the "industrial accounts". This group also published a list of discounts known as the Montreal Industrial List, with the intention of maintaining prices at a higher level than they would have been under conditions of free and open competition among the members of the group.

The Quebec Plumbing and Heating Council had sufficient control over the market for plumbing and heating supplies in the City of Montreal and elsewhere in the Province of Quebec to lessen competition among the members of the Council. Also, it was able successfully to bring pressure to bear on manufacturers to cut off supplies to certain smaller wholesalers. Although there is evidence that one of the purposes of the meetings of the Council was the exchange of credit information, the agreements between the members did not only relate to the matters set forth in subsection (2) of section 32 of the Combines Investigation Act. They also were concerned with prices and channels of distribution, and tended to restrict entry into the wholesale plumbing and heating trade.

The Industrial Group had sufficient control over the market for plumbing and heating supplies sold to industrial accounts in the City of Montreal and elsewhere in the Province of Quebec to maintain the Montreal Industrial List in one form or another over a period of at least fifteen years. As above, this agreement was not related only to one or more of the activities set forth in subsection (2) of section 32 of the Combines Investigation Act, but rather was directed towards arrangements with respect to discounts and prices.

The Commission does not find either of these agreements to be in the public interest, but rather harmful to it.

3. Recommendations

The Commission considers that the disbanding of The Quebec Plumbing and Heating Council does not necessarily mean that efforts to reactivate the agreements to reduce competition will not recur. The Commission recommends that steps should be taken to seek prohibition of resumption of collusive activities by the wholesalers of plumbing and heating supplies against whom allegations are set forth in the Statement of Evidence, under section 31 subsection (2) of the Combines Investigation Act.

(Sgd.) Robert S. MacLellan
Chairman
(Sgd.) Pierre Carignan
Member
(Sgd.) W.D.R. Eldon
Member

Ottawa October 28, 1963.

APPENDIX A

Witnesses Examined in this Inquiry by a Representative of the Director of Investigation and Research

Pursuant to section 17 of the Combines Investigation Act, the following witnesses were examined before a member of the Restrictive Trade Practices Commission:

Before Pierre Carignan, Q.C., at Montreal:

April 17, 1961 -

Charles E. Chartrand,
Former Secretary,
The Quebec Plumbing and Heating Council.

April 18, 1961 -

Thomas G. Markey, General Sales Manager, Crane Limited.

W. C. Hawe, Branch Manager, (Montreal and St. Lambert) Emco Limited.

April 19, 1961 -

Gerald H. Tessier, Manager (Montreal Branch), The James Robertson Company (Limited).

Donald S. Munro,
President,
Jamieson-Dansereau Limited.

April 20, 1961 -

Bernard Simonovitch, (sometimes known as Simon), Former President, International Plumbing and Heating Supplies Limited. April 20, 1961 - (continued)

M. Port,
Manager,
(Plumbing and Heating Department),
La Riviere Inc.

April 21, 1961 -

Philip Pressman, Secretary-Treasurer, Ideal Plumbing Supplies Ltd.

Joseph Rimerman,
President,
Craig Plumbing & Heating Supplies Co. Ltd.

John Wright, Vice-President and Manager, Canadian Plumbing & Heating Specialties Limited.

April 24, 1961 -

Roger De Serres, President, Omer De Serres Ltee.

Edouard Lapierre, General Manager, (Plumbing and Heating Division), Omer De Serres Ltee.

Jean-Paul Noiseux, Secretary-Treasurer, L.N. & J.E. Noiseux Limitee.

Jules Noiseux,
President,
L.N. & J.E. Noiseux Limitee.

April 25, 1961 -

Theodore Nadeau, President and Manager, Mott Company Limited. April 25, 1961 - (continued)

Marcel Drouin,
President,
Marcel Drouin Ltd.

Maurice Prud'homme,
President,
A. Prud'homme & Fils Limitee.

Pierre Deschenes, Assistant Manager, Deschenes & Fils Ltee.

April 26, 1961 -

John Hall, Branch Manager (Montreal), Grinnell Company of Canada Limited.

Leslie A. Osmond, Manufacturers' Agent, (Plumbing and Heating Materials), Osmond Agencies Ltd.

Philip Linder, Lingal Inc., (a semi-jobber firm).

Sidney Weinstein,
President,
Main Plumbing & Heating Supplies Co.

Nello Malo, Formerly President, Nelco Supplies Limited.

May 16, 1961 -

Earle Dunk,
District Sales Manager,
The James Robertson Company (Limited).

May 23, 1961 -

George E. Le Marquand, Manager, The Garth Company (Wholesale Distributors).

May 24, 1961 -

Lawrence James Sullivan, President, Sullivan Company Limited.

Roger Lalonde, Formerly Sales Manager (Montreal), La Fonderie Ste. Croix Limitee.

Gordon Bennett Harrison, General Sales Manager, The James Morrison Brass Mfg. Co. Limited.

Gerald Samson,
Sales Manager (Province of Quebec),
The James Morrison Brass
Mfg. Co. Limited.

Gerald Belanger, General Manager and Treasurer, Regent Brass Limited.

May 25, 1961 -

Colin J. Ross, Montreal District Manager, Noranda Copper and Brass Limited.

Raymond Dethier, Chief Clerk, The Garth Company. Before C. Rhodes Smith, Q.C., then Chairman of the Commission, at Toronto:

May 31, 1961 -

Harold William Lee, President and General Manager, Cello Products Limited.

John Lawrence Elder, Sales Manager, Cello Products Limited.

George William Ivan Ottaway, President, Allpriser Limited.

APPENDIX B

REFERENCES

Chapter I

- 1 See list of witnesses in Appendix A
- Where references are made to the transcript of oral evidence taken in this inquiry, it is cited as "Evidence" with the appropriate volume and page number.
- The transcript of this hearing before the Commission is cited in this Report as "Hearing".
- The Statement of Evidence in this inquiry is referred to hereafter in footnotes as "Statement".
- 5 Evidence, Vol.I, English, pp.37-8

Chapter II

- 6 Serial 697.
- 7 The by-laws are found in Serial Numbers 694 to 701 inclusive; they are photostats of documents seized by representatives of the Director on the premises of the Council and entered as evidence at a hearing before a member of the Restrictive Trade Practices Commission. Other photostats of documents seized and entered in evidence will hereafter be referred to by Serial Number.
- 8 Evidence, Vol.I, English, p.221.
- 9 Evidence, Vol.I, English, p.269.
- Evidence, Vol.I, English, p.394.
- 11 Evidence, Vol.I, English, p.139.

- 12 Evidence, Vol.I, English, pp.29-30.
- 13 Evidence, Vol.I, English, p.108.
- See evidence of witnesses De Serres in Evidence, Vol.II, p.446; Simonovitch, Vol.I, English, p.284; Munro, Vol.I, English, pp.268-9 and Port, Vol.I, English, p.326.
- 15 Statement, pp.12, 25, 31.
- 16 Serial 1755.
- 17 Evidence, Vol.I, English, p.149.
- 18 Evidence, Vol.I, English, pp.61-6, 74-5.
- See, for example, Serial 399 and Evidence (Simonovitch), Vol.I, English, pp.296-7.
- 20 Evidence, Vol.I, English, p.261
- Serial 372, referred to in Evidence, Vol.I, English, p.283.
- 22 Evidence, Vol.I, English, pp.285-6.
- 23 Evidence, Vol.I, English, p.154.
- For example, see the evidence of T. Nadeau of Mott Company Limited, Evidence, Vol.I, French, p.20; also that of Marcel Drouin of Marcel Drouin Ltee., Vol.I, French, p.48; and of J.P. Noiseux of L.N. & J.E. Noiseux Limitee, Vol.II, pp.511-2.
- 25 See for example, the evidence of E. Lapierre of Omer De Serres Limitee, Evidence, Vol.II, p.471; of J.P. Noiseux of L.N. & J.E. Noiseux Limitee, Vol.II, p.513; and of P. Pressman of Ideal Plumbing Supplies Ltd., Vol.I, English, pp.346-7.
- Evidence, Vol.I, English, pp.35-6 and Serial 364.

- 27 Evidence, Vol.I, English, pp.73-9.
- Evidence, Vol.II, pp.460-1.
- Evidence, (Chartrand) Vol.I, English, pp.86-90; also Serials 1623 to 1626.
- 30 Evidence, Vol.I, English, p.95.
- 31 Evidence, Vol. II, pp. 514-7.
- 32 The letter, Serials 1163 and 1164, is quoted in full in Statement, pp.35-6.
- 33 Evidence, (Chartrand) Vol.I, English, pp.29-30.
- 34 Hearing, pp. 9 and 89.
- 35 Hearing, pp.9-15.
- 36 Hearing, pp.89-90.
- 37 Hearing, pp.28-9.
- 38 Hearing, p.78.
- 39 Hearing, p.45.
- 40 Evidence, (Lee) Vol.V, pp.926-7.
- Evidence, Vol.V, pp.963-4.
- 42 Evidence, Vol. V, pp. 964-5.
- Evidence, Vol. V, pp. 966, 979-80.
- 44 Evidence, Vol. V, pp. 980-1.
- Evidence, Vol.III, pp. 733-7.
- Evidence, Vol.III, pp.737-8.
- Evidence, Vol.III, pp.738-9.

- 48 Serial 10681.
- 49 Evidence, Vol. V, pp. 937-42.
- 50 Evidence, Vol.V, pp.970-4.
- 51 Evidence, Vol.IV, pp.902-4; Serial 10326.
- 52 Evidence, Vol.IV, pp.903-4.
- 53 Evidence, Vol.IV, pp.839-42.
- 54 Evidence, Vol. IV, pp. 842-44.
- 55 Serial 400.
- 56 Evidence, Vol.IV, p.843.
- 57 Evidence, Vol.IV, pp. 778-80.
- 58 Evidence, Vol. IV, pp.846-7.
- 59 Evidence, Vol.IV, p.847.
- Evidence, Vol.IV, pp.846-48.
- 61 Evidence, Vol.IV, pp.849-50.
- 62 Evidence, Vol.IV, pp.852-54.
- 63 Evidence, Vol.I, English, p.137.
- Evidence, Vol.I, English, p.223.
- 65 Evidence, Vol.I, French, p.21.
- 66 Evidence, Vol.I, French, p.108.
- 67 Evidence, Vol.I, French, pp.83-5.
- Evidence, Vol.I, English, pp.301-2.
- 69 Evidence, Vol.II, pp.512-3.
- 70 Evidence, Vol.I, English, pp.395-6.

- 71 Evidence, Vol.II, p.453.
- 72 Evidence, Vol.I, French, p.48.
- 73 Evidence, Vol.III, pp.750-1.
- 74 Evidence, Vol. III, p. 770.
- 75 Evidence, Vol.I, English, p.347.
- 76 Evidence, Vol.I, English, pp.347-8.
- 77 Evidence, Vol.I, English, p.300; Serial 928.
- 78 Evidence, Vol.I, English, pp.250-1; Serial 939.
- 79 Evidence, (Pressman) Vol.I, English, p.368.
- 80 Evidence, Vol.I, English, pp.155-6.
- 81 Evidence, Vol.I, English, pp.329-30.
- 82 Evidence, Vol.I, English, p.139.
- 83 Evidence, Vol.II, p.439.
- 84 Hearing, p.155.
- 85 <u>Hearing</u>, p.200.
- 86 Statement, pp.55-6.
- 87 Hearing, p.144.
- 88 Evidence, Vol.I, French, pp.87-9.
- 89 <u>Hearing</u>, pp.149-52.
- 90 Evidence, Vol.III, pp.764-7;770.
- 91 Evidence, Vol.I, English, pp.106-8.
- 92 Evidence, Vol.I, English, p.108.

Chapter III

- 93 Statement, p.183.
- 94 Statement, p.100.
- 95 Evidence, Vol.I, English, pp.243, 321.
- 96 Evidence, (Tessier) Vol.I, English, pp.231-2; (Hall) Vol.III, p.724.
- 97 Evidence, Vol.III, pp.719-21; also Serials 1432-41, 1493-1502. 1544-60.
- 98 Evidence, Vol.III, pp.726-7.
- 99 Evidence, Vol.III, pp.728-9.
- 100 Evidence, Vol.III, pp.727-8.
- 101 Evidence, (Le Marquand) Vol. IV, p.804.
- Evidence, (Le Marquand) Vol. IV, pp.809-10.
- 103 Evidence, Vol.I, English, pp.239-40.
- 104 Evidence, Vol.IV, pp.806-7.
- Evidence, (Simonovitch) Vol.I, English, p.279;
 (Rimerman) Vol.I, English, p.379; (Pressman) Vol.I,
 English, p.337; (Noiseux) Vol.II, pp.490-1; (Nadeau)
 Vol.I, French, pp.5-6; (Weinstein) Vol.III, pp.742-3.
- Evidence, (Munro) Vol.I, English, pp.257-8; (Wright)

 Vol.I, English, p.391; (De Serres) Vol.II, pp.405-6;
 (Drouin) Vol.I, French, pp.39-40; (Prud'homme) Vol.I,

 French, pp.70-4; (Deschenes) Vol.I, French, p.98.
- Evidence, Vol.III, pp.760-1.
- 108 <u>Hearing</u>, pp.132-3.
- 109 Evidence, Vol.I, English, pp.243-4.
- 110 Evidence, Vol.III, p.722.

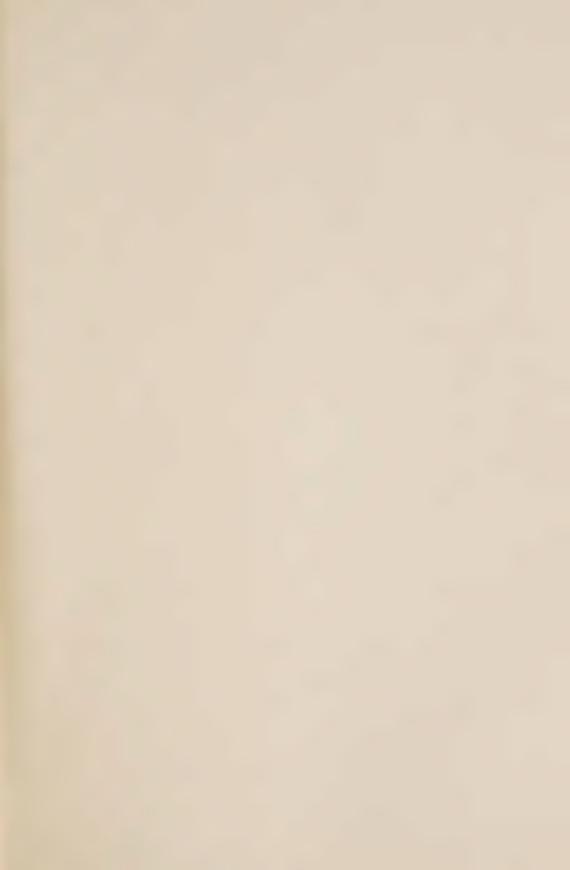
- 111 Evidence, Vol.I, English, p.316.
- Evidence, Vol.IV, pp.817-8.
- 113 Hearing, pp.77-9.

Chapter IV

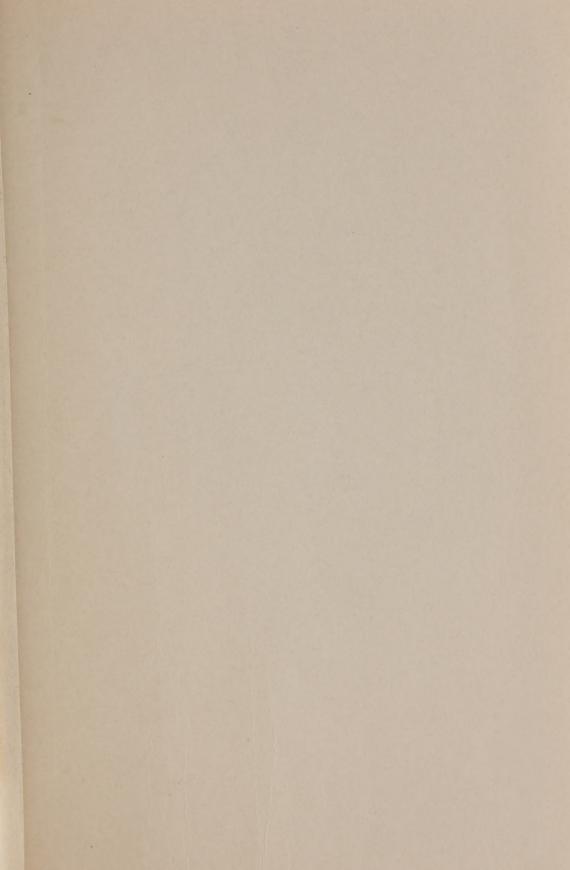
- 114 8 D.L.R. (2nd) (1957) 449 at 473.
- 115 Statement, pp.181-2.
- 116 Hearing, pp. 71-5.
- 117 CCC (1961) Vol.1313, p.201 at pp.251-2.
- Statement, p.183.
- Hearing, pp.206-7; Restrictive Trade Practices
 Commission, Report Concerning the Manufacture,
 Distribution and Sale of Metal Culverts and Related
 Products, Ottawa, 1957, pp.37-8.
- Evidence, Vol.I, English, pp.43-6.
- 121 Serials 384-5; Evidence, Vol.I, English, p.58.
- 122 Serial 384.
- 123 Serials 702, 704, 705 and 706.
- 124 Serials 694 to 701.
- His exact words are contained in the following excerpt from his testimony:
 - "Q. Perhaps while you are on that there is one point
 I might get clear. What was the membership fee
 paid by the members of the Council?
 - A. [Chartrand] This was arrived at before I actually joined the Council and I only know that from the time I became a member of the Council I followed the recommendations or the directives that were given to me. . . "

(Evidence, Vol.I, English, p.28)

Evidence, (Osmond) Vol.III, pp.728-9.









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